

---

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)  
) DEFENSE MEMORANDUM  
) OF LAW IN SUPPORT OF ITS  
) CHALLENGES FOR “GOOD  
) CAUSE” FOR THE REMOVAL OF  
) PRESIDING OFFICER FOR  
) FAILURE TO MEET  
) QUALIFICATIONS UNDER  
) MILITARY COMMISSION ORDER 1  
) PARA 4(A).(4)  
)  
) September 7, 2004

---

1. Timeliness. This memorandum is filed in a timely manner as prescribed by the Presiding Officer in the initial Commission hearing of 24 August 2004.

2. Overview. During voir dire of the Presiding Officer appointed to Mr. Hamdan’s Military Commission revealed that his bar membership was limited to being an Associate Member of the Virginia State Bar. At the conclusion of voir dire, Defense challenged the appointment of the Presiding Officer based on his lack of qualifications for current service as a Judge Advocate as required under MCO No.1 paragraph 4(A)(4). The Presiding Officer indicated that he believed that he was qualified as a Judge Advocate but permitted Defense Counsel to brief the issue to the Appointing Authority.

3. Argument: Paragraph 4(A)(4) of MCO No. 1 states that the Presiding Officer shall be a military officer who is a Judge Advocate of any armed force. COL Brownback was recalled to active duty to serve as the Presiding Officer, after having been retired for approximately 5 years. Prior to his retirement COL Brownback served as a military judge with the United States Army for approximately 10 years.

Army regulation 27-1 paragraph 13(2)(h)(2) requires all officers assigned or detailed to the Judge Advocate General Corps of the Army to remain in good standing in the bar of the highest court of the State of the United States, the District of Columbia, or a Federal Court. The Virginia State Bar maintains four classes of membership, active members, associate members, judicial members, and retired members.

Paragraph 3(b) of the Organization and Government of the Virginia State Bar defines an associate members as: “Those persons who have heretofore or may hereafter be admitted to practice law in the courts of this state but who are not presently engaged and all person on the law faculties of any law schools of this state that have been approved by the American Bar Association may become associate members of the Virginia State Bar up on application to the secretary and payment of the required dues. Associate members shall be entitled to all the privileges of the active members **except that they may not practice law**, vote or hold office

(other than as members of committees) in the Virginia State Bar.” (*Emphasis added*). Available at <http://www.vsb.org/profguides/org.pdf>.

The issue of whether a military Judge Advocate was disqualified because of inactive status in a state bar was addressed in *United States v. Maher*, 54 M.J. 776, (A.F.C.M.R. 2001). In *Maher*, the court had the opportunity to review the Air Force regulation regarding the compliance with licensing requirements. Similar to the Army, the Air Force Manual 51-30 paragraph 1.1 required “once designated, a judge advocate must maintain current compliance with the licensing requirements, if any, of a Federal court, or the highest court of a state, territory, or the District of Columbia which qualify the officer to engage in the active practice of law.” In *Maher*, the Court found that being inactive in a state had two potential meanings. Under the rules of some states, “inactive status meant that the individual was not practicing law, and thus not in good standing, and in other states where an inactive status merely meant that the individual practiced law out of state, (military) but was good standing in the state.” The Court then determined that the military judge in this case fell into the latter.

The issue of whether an associate member of the Virginia State bar is in good standing to practice law out of state came before the United States District Court for the District of Maryland in *Brink v. Dalesio*, 82 F.R.D. 664 (1997), *rev in part on different grounds* 667 F.2d, 420 (4th Cir. 1981). In *Brink*, the Plaintiffs had filed action against the defendants for alleged violations of their fiduciary obligations. Among the defendant’s arguments against the production of discovery was that the defendant’s accountant, Landsman was an attorney licensed to practice in Virginia as an associate member and thus all files turned over to him were protected by attorney client privilege. The Court summarily rejected the argument that Landsman was an attorney pointing out that Virginia State Bar only showed him as an associate member and **that associate members can not practice**. (*Emphasis added*). *Id.* 674. Under the Court’s ruling Virginia then clearly falls into the first category of states wherein inactive/associate membership is not grounds to practice in the Federal Courts or other courts and as such is not sufficient to satisfy the Army’s requirement.

A strict requirement of active membership in a qualifying court is in keeping with the requirements leveled on civilian counsel for Military Commissions, paragraph 3.a.2)b. of MCI No. 5 requires civilian counsel to submit evidence of **active** membership in good standing of a qualifying jurisdiction. (*Emphasis added*). This rule is more strict than the qualification for civilian counsel in a general courts-martial set out in *United States v. Steele*, 53 M.J. 274 (C.A.A.F. 2000). MCI No. 5’s requirement takes to heart Judge Cox’s recommendation that in order to meet the requirements of Article 27 of the Uniform Code of Military Justice that a person be qualified to actively represent a client in either state or Federal court. To place such a requirement solely on the Defense and not on the Presiding Officer is simply not in with the judicial balance expected in a full and fair trial.

Finally the fact that the Presiding Officer had not engaged in the practice of law or actively participated in Continuing Legal Education in the past 5 years further weighs against any waiver. As indicated by the Presiding Officer during voir dire in order to obtain an active membership in the Virginia State Bar, he would first have to complete Continuing Legal Education requirements in addition to paying fees. The failure to have attended Continued Legal Education for an active

service or reserve judge advocate is at least partially mitigated by the fact that military training serves many of the same goals. In COL Brownback's case, however, he has by his own admission worked far outside the realm of the law and has by virtue of his retirement not received legal training in more than 5 years.

4. Relief Requested: That the Appointing Authority determine that good cause exists for the challenge of the Presiding Officer based on the fact that he is not an active member in good standing of the Virginia State Bar and thus not qualified as a judge advocate.

CHARLES D. SWIFT  
LCDR, JAGC, U.S. Navy  
Detailed Defense Counsel